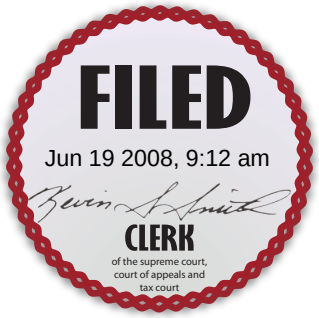

ATTORNEY FOR APPELLANT:

NICHOLAS F. STEIN
Law Office of Nicholas Stein
New Albany, Indiana

ATTORNEYS FOR APPELLEE:

MARY JO WETZEL
ERIC D. JOHNSON
CRYSTAL G. ROWE
Kightlinger & Gray, LLP
New Albany, Indiana

IN THE COURT OF APPEALS OF INDIANA

SARA L. COX,	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 10A04-0712-CV-742
	)	
DEAL$ NOTHING OVER A DOLLAR, LLC,	)	
	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Cecile Blau, Judge
Cause No. 10D02-0507-CT-123

June 19, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Sara L. Cox appeals the trial court's grant of Deal$ Nothing Over a Dollar, LLC's ("Deal$") motion for summary judgment terminating her premises liability claim against Deal$. Cox raises three issues on appeal, which all deal with whether there were genuine issues of material fact rendering summary judgment inappropriate. We restate these issues as:

I. Whether the bumper rails at the base of the table-high display refrigerator-freezer constituted a "tripping hazard."

II. Whether Deal$ owed Cox a duty of reasonable care to protect against the bumper rail.

III. Whether the bumper rail caused Cox to fall.

We reverse.

FACTS AND PROCEDURAL HISTORY

The evidence designated for summary judgment was as follows: Deal$ operated a supermarket/convenience store (the "store") located in Jeffersonville, Indiana. Cox was shopping at the store on March 12, 2005, and while shopping, went to look for some ice cream. Cox approached the table-high display freezers located in the middle of an isle in the store. As Cox approached, she tripped on the Boston Boss bumper rail located at the bottom of the freezer, which was a little over six-inches off the ground, and was injured. Cox filed suit against Deal$ alleging Deal$ was negligent on the basis of premises liability.

The Boston Boss is designed by Boston Retail Products, Inc. and is a bumper rail type unit that is floor-mounted adjacent to large box freezer displays in grocery and convenient stores. The Boston Boss ("bumper rail") was designed to protect the thin skin of the freezer and its underlying refrigeration components from items such as shopping carts.

Deal$ used the bumper rail system in thirty-one stores at the self-contained freezer displays. In some stores, not the store at issue, Deal$ would install corner guards in addition to the bumper rails.

Mike Costello, Deal$'s project manager, testified that it would have been safer for Deal$ to use a freezer with built-in bumper guards. *Appellant's App.* at 266.

H. Richard Hicks, a certified professional engineer and a forensic engineer testified that he had investigated over 125 cases for both plaintiff and defense counsel, was qualified in court as an expert in slips, trips, and falls, had performed investigations of slip and fall cases in grocery stores, and was familiar with safety standards for a safe walking environment where pedestrians may pass. *Id.* at 225. Hicks testified that, based on his experience and familiarity with the store and the facts surrounding this case, the bumper rail "where Cox fell is a tripping hazard," that placement of the rail "violated a fundamental concept of safety," and that it was reasonable for Cox to not have noticed it before. *Id.* at 232.

Frederick Bremer, an architect who has worked in the grocery store business for twelve years, testified that based on his duties in risk management and evaluation and his knowledge of Boston Retail's line of products, the bumper rail as installed was a tripping hazard and posed an unreasonable, foreseeable risk. *Id.* at 244. Bremer had not visited the store.

A Boston Retail employee, James S. Wallace, testified that he did not believe the bumper rail was a tripping hazard and that it appeared the store had properly installed the bumper rail pursuant to manufacturer's specifications. *Id.* at 72.

The trial court granted Deal$'s motion. Cox now appeals.

DISCUSSION AND DECISION

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Rhoades v. Heritage Invs., LLC*, 839 N.E.2d 788, 791 (Ind. Ct. App. 2006), *trans. denied*. When reviewing the trial court's decision on a summary judgment motion, we stand in the shoes of the trial court. *Id*.

To recover under a theory of premises liability sounding in negligence, a plaintiff must establish the following elements: "'(1) defendant's duty to conform his conduct to a standard of care arising from his relationship with the plaintiff; (2) a failure of the defendant to conform his conduct to the standard of care; and (3) an injury to the plaintiff proximately caused by the breach.'" *Horine v. Homes by Dave Thompson*, 834 N.E.2d 680, 683 (Ind. Ct. App. 2005) (quoting *Estate of Heck ex. rel. v. Stoffer*, 786 N.E.2d 265, 268 (Ind. 2003)). A defendant in a negligence case seeking summary judgment must demonstrate that the designated facts do not support a material element of plaintiff's claim or that an affirmative defense precludes liability. *Coffman v. PSI Energy*, 815 N.E.2d 522, 526 (Ind. Ct. App. 2004), *trans. denied* (2005).

"We note that summary judgment is generally inappropriate in negligence cases because issues of contributory negligence, causation, and reasonable care are more appropriately left for the trier of fact." *Id.* At the same time, we recognize that determining whether the facts support a viable negligence claim is a question of law. *Id.*

Generally, a landowner has a common-law duty to keep his property in a reasonably safe condition for business invitees, and that obligation exists where injury is reasonably

foreseeable in light of the hazardous nature of the instrumentalities on the owner's premises. *Plan-Tec, Inc. v. Wiggins*, 443 N.E.2d 1212, 1218 (Ind. Ct. App. 1983). Here, it is undisputed that Cox was a business invitee, and as such, Deal$ owed her "the highest duty of care . . ., that duty being to exercise reasonable care for the invitee[']s protection while [s]he is on the premises." *Rhoades,* 839 N.E.2d at 791 (citing *Taylor v. Duke,* 713 N.E.2d 877, 881 (Ind. Ct. App. 1999)). Premises liability is described in the following:

> A landowner is liable for harm caused to an invitee by a condition on the land only if the landowner: (1) knows of or through the exercise of reasonable care would discover the condition and realize that it involves an unreasonable risk of harm to such invitee; (2) should expect that the invitee will fail to discover or realize the danger or fail to protect against it; and (3) fails to exercise reasonable care in protecting the invitee against the danger.

Parsons v. Arrowhead Golf, Inc., 874 N.E.2d 993, 998 (Ind. Ct. App. 2007).

The first issue is whether Cox put forth sufficient evidence to create a genuine issue of material fact that the bumper rail was a "tripping hazard" or a condition posing an unreasonable risk. *Appellant's Br.* at 14. Cox and Deal$ agree that this case is not about products liability and whether the bumper rail is unsafe *per se*. Instead, the issue is whether the bumper rail, as installed and in its setting, was a hazard upon which, in the absence of reasonable care and the presence of proximate cause, premises liability provides relief.

Here, Cox designated evidence from a professional engineer, Hicks, that the bumper rail was a tripping hazard that, as placed on the floor near the freezer, caused an unreasonable danger to Cox, and was the proximate cause of her fall. *Appellant's App.* at 232. Cox also designated the testimony of Bremer, who is experienced in the grocery business as a risk manager and evaluator. Bremer stated that he was familiar with the bumper rail at issue and

opined that the ends of the rail system protruded out into where customer traffic was foreseeable, "thereby creating an unreasonable, foreseeable risk of tripping the customer."[1] *Id.* at 244. Deal$'s argument that the bumper rail system is not defective and therefore cannot constitute an unreasonable hazard is misplaced because, as noted above, Cox does not raise an issue of products liability. This evidence is sufficient to raise a genuine issue of material fact regarding whether the bumper rail system in the store is a dangerous condition that poses an unreasonable risk.

Cox next argues that summary judgment was inappropriate because there were sufficient facts for the jury to conclude that Deal$ failed to exercise reasonable care in inspecting and protecting Cox from the bumper rail. The duty of reasonable care is defined by the relationship of the parties, the reasonable foreseeability of harm to the person injured, and public policy concerns. *Parsons*, 874 N.E.2d at 997. We have already established that Cox was Deal$'s invitee, and that Deal$ owed Cox the highest duty of reasonable care, specifically, to protect against an unreasonable danger. We also found there were sufficient facts to find the bumper rail posed an unreasonable and foreseeable danger.

Deal$ claims, however, that the facts did not demonstrate "that Deal$ could have

[1] Deal$ argues that Bremer's testimony is "pure speculation" that may not, by itself, establish negligence. *Appellee's Br.* at 13 (citing *Beckom v. Quigley*, 824 N.E.2d 420, 424 (Ind. Ct. App. 2005)). Although Deal$ correctly points out that Bremer never visited the store, reviewed the site of the accident and all the visual distractions in place, nor concluded as to the cause of Cox's injury, Cox put forth evidence that Bremer had reviewed several photos of the bumper rail at the store, other matters of discovery, and statements of interested parties before he conducted his review. *Appellant's App.* at 244. Deal$ cites *Beckom* for the proposition that a claim of negligence may not be supported by mere speculative testimony. 824 N.E.2d at 424. We agree, but find that Bremer's testimony is not based on pure speculation and, even if it was, Hicks's testimony alone was sufficient to create a genuine issue of material fact as to whether the bumper rail was hazardous and that Deal$ owed Cox a duty to protect her from the hazard.

discovered, through the use of reasonable care, that the bumper posed an unreasonable risk of harm to invitees." *Appellee's Br.* at 12. Deal$ argues that the bumper rail had been in use without incident for several years at its store as well as many other stores nationwide, and that the manufacturer, Boston Retail, has sold the bumper rail system since 1994 and was not aware of any risks.

This court has held that the issue of notice of a danger is a question of fact for the trier of fact. *St. Mary's Ctr. of Evansville, Inc. v. Loomis*, 783 N.E.2d 274, 279 (Ind. Ct. App. 2002) (citing *Schloot v. Guinevere Real Estate Corp.*, 697 N.E.2d 1273, 1276 (Ind. Ct. App. 1998)). The evidence to support the owner had notice of the dangerous condition does not have to be conclusive, but only established by a reasonable inference. *Id.*

> Under the Restatement (Second) of Torts (1965):
>
> § 343. Dangerous Conditions Known to or Discoverable by Possessor
>
> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he:
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

Smith v. Baxter, 796 N.E.2d at 243-44 (quoting Restatement (Second) of Torts §343 (1965)).

> "For the purpose of analysis of breach of duty, a landowner's knowledge is evaluated by an objective standard. This is in contrast to the determination of incurred risk, wherein the invitee's mental state of venturousness (knowledge, appreciation, and voluntary acceptance of the risk) demands a subjective analysis of actual knowledge."

Baxter, 796 N.E.2d at 244 (quoting *Douglass v. Irwin*, 549 N.E.2d 368, 370 (Ind. 1990)).[2]

The history of the bumper rail does not foreclose the disputed fact of whether Deal$ should have discovered its potential danger. Instead, we reserve that issue for the trier of fact.

Lastly, Cox contends that there were sufficient facts to raise a genuine issue that the bumper rail caused her to fall. Specifically, she points to her deposition testimony where she stated that she tripped on "that rail . . ." and indicated it was the rail at the base of the refrigerator system. *Appellant's App.* at 251.

"'Whether an act is the proximate cause of a plaintiff's injury depends upon whether the injury was a natural and probable consequence of the act at issue, which, in light of the attending circumstances, could have been reasonably foreseen or anticipated.'" *Mayfield v. Levy Co.*, 833 N.E.2d 501, 506 (Ind. Ct. App. 2005) (quoting *Lane v. St. Joseph's Reg'l Med. Ctr.*, 817 N.E.2d 266, 273 (Ind. Ct. App. 2004)). Causation may not be inferred merely through the existence of an allegedly dangerous condition. *Midwest Commerce Banking v. Livings*, 608 N.E.2d 1010, 1012-13 (Ind. Ct. App. 1993). The plaintiff must identify that the defendant owed the plaintiff a duty, which was breached, and the breach was the *cause* of the plaintiff's injury. *Winchell v. Guy*, 857 N.E.2d 1024, 1029 (Ind. Ct. App. 2006); *see also Horine*, 834 N.E.2d at 683.

Although Deal$ claims that Cox's deposition testimony was fraught with

inconsistencies and uncertainty as to what caused her to fall, she distinctly identified the bumper rail as the cause of her fall. *Appellant's App.* at 251. The remainder of her testimony goes to the weight of the evidence and the credibility of her as a witness, issues this court may not decide and that are inappropriate for summary judgment. Cox designated sufficient evidence to create a genuine issue of material fact as to whether her fall was caused by the bumper rail.

Reversed.

BAILEY, J., concurs.

FRIEDLANDER, J., dissents with separate opinion.

[2] We note that sections 343 and 343A of the Restatement (Second) of Torts (1965), setting forth duty of care owed by possessor of land to an invitee, survived adoption of the Comparative Fault Act and remain a part of Indiana's common law. *Tate v. Cambridge Commons Apartments of Indianapolis*, 712 N.E.2d 525, 527 (Ind. Ct. App. 1999), *trans. denied*.

IN THE
COURT OF APPEALS OF INDIANA

SARA L. COX	)	
	)	
Appellant-Plaintiff,	)	
	)	
vs.	)	No. 10A04-0712-CV-742
	)	
DEAL$ NOTHING OVER A DOLLAR, LLC,	)	
	)	
	)	
Appellee-Defendant.	)	

APPEAL FROM THE CLARK SUPERIOR COURT
The Honorable Cecile Blau, Judge
Cause No. 10D02-0507-CT-123

FRIEDLANDER, Judge, **dissenting**

I would affirm summary judgment in favor of Deal$ Nothing Over A Dollar, LLC (Deal$) and therefore respectfully dissent.

I agree with several of the conclusions my colleagues reach in their path to reversing summary judgment. For instance, I agree that this is not a case sounding in products liability. It is instead a premises liability claim. I also agree that, on the facts of this case, Cox was a business invitee. That status, by law, defined Deal$'s duty to Cox. As the Majority notes – correctly – the general duty was to exercise reasonable care for Cox while she was on Deal$'s premises. Our courts have identified the duty specific to a business invitee as follows:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
>
> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
>
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
>
> (c) fails to exercise reasonable care to protect them against the danger.

PSI Energy, Inc. v. Roberts, 829 N.E.2d 943, 957-58 (Ind. 2005) (quoting Restatement (Second) of Torts, § 343). At this point, however, I part philosophical ways with my colleagues. The precise point of departure, as I see it, is how much is required to remove a question from the jury thus rendering it ripe for summary disposition.

The trial court determined that Cox could not, as a matter of law, prevail in her premises liability action. The Majority determines today that such is not necessarily the case; a jury must decide whether Cox can prove her claim. "Prove her claim" in this context means that Cox must prove, among other things, that the allegedly negligent condition in Deal$'s store, i.e., the bumper rail, posed an "unreasonable risk of harm" to her and, further, that Deal$ knew about it or should have known that it did so. Can Cox prove her claim? It seems to me the Majority concludes that she might, based upon the opinion of an "experienced … grocery business … risk manager and evaluator." *Slip op.* at 6. That risk evaluator rendered his opinion after viewing several photographs of the bumper rail in question and reviewing statements and discovery materials associated with this lawsuit. His opinion? The bumper rail protruded into an area where customer traffic was foreseeable "thereby creating an *unreasonable, foreseeable* risk of tripping the customer." *Id*. (emphasis

supplied). In my view, after considering the evidence designated by Deal$, the evaluator's opinion did not sufficiently call into question either the reasonableness or the foreseeability of the risk that this occurrence might happen.

Deal$'s designated evidence showed that this bumper rail was first used commercially in 1995. Deal$ cited at least nine major retailers who use this system in the United States. It also noted that the bumper rail is used in Canada, Mexico, Central America, South America, Western Europe, Russia, China, and Scandinavia. Yet, in spite of its global use for more than a decade, the bumper rail's manufacturer, Boston Retail, has *never* received notification of an injury attributed to this product. This is not surprising. Cox herself had been in the store on previous occasions and purchased products from this freezer without incident. With regard to her fall, Cox initially claimed she did not know what caused her to fall. It was not until later that she claimed she tripped on one of the bumper rails. Even at that, she admitted she did not "have any sensation of [her] feet being caught in anything[.]" *Appellant's Appendix* at 66, page 28.

In summary, the undisputed designated evidence established that the bumper rail has been widely used the world over without incident for well in excess of ten years. For its part, Deal$ had never had a bumper-rail-related incident in all the time it had been used in Deal$'s store. It is beyond me how a jury could conclude from the foregoing evidence that there is an unreasonable risk inherent in the bumper rail, much less how Deal$ should have foreseen it.

This brings me back to the aforementioned philosophical difference. My colleagues dismiss this line of reasoning by holding that the issue of notice of a danger is a question for the trier of fact. Applied in such a rote fashion on facts such as these, this principle seems to

render summary judgment practically unattainable in this context. I can find no case that enunciates such a rule. Thus, upon my view that summary judgment is appropriate where the evidence of notice of risk and foreseeability is as threadbare as that in the instant case, I would affirm summary judgment in favor of Deal$.